IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

APPEAL NO.478 OF 2002

Dnyaneshwar Bhiva Mande]
Age 27 years Occ: Agri.]
Residing at Belgaon Kurhe]
Taluka Igatpuri, Dist.Nashik]..Appellant
[Ori.Accused]

Vs.

The State of Maharashtra]
(At the instance of Sr.P.I.]
Wadivarhe Police Station,]
Dist.Nashik)]..Respondent

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Shri.Ganesh Gole Advocate for Appellant
Smt.V.R.Bhosale A.P.P. for State

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CORAM: S.B.MHASE &
SMT.V.K.TAHILRAMANI,JJ.

DATE : JANUARY 12, 2007

ORAL JUDGMENT :[PER SMT.V.K.TAHILRAMANI,J.]

1. Through this appeal, the appellant-original accused no.1 has challenged the judgment and order dated 4.3.2002 passed by the learned 1st Adhoc Additional Sessions Judge, Nashik in Sessions Case No.15 of 2000. By the said judgment and order, the learned Sessions Judge convicted the appellant under Section 302 of IPC and sentenced him to imprisonment

for life.

2. The prosecution story briefly stated is as under:

. The accused Dnyaneshwar Bhiva Mande was married to Mangal (deceased) who was the daughter of P.W.2 Janabai Nivrutti More, about four years prior to the incident. Original accused no.2 Khandu Bhiva Mande was the elder brother of the appellant. After the marriage of Mangal with appellant, Mangal came to reside with appellant at Belgaon Kurhe. The appellant started illtreating Mangal and forced Mangal to ask her mother to give him money for construction of his house.

. It is the case of prosecution that on 25.9.1999, appellant poured kerosene on Mangal and set her on fire. Mangal was taken to Civil Hospital at Nashik. After she was taken to Hospital, Dr.Anay Thigale (P.W.3) examined Mangal at 8.15 p.m. on 25.9.1999. At that time, Mangal gave history of homicidal burns on her person by her husband at about 8.00 p.m. The said history came to be recorded in the case papers (Exhibit-29). The police came to be informed.

Requisition came to be made to P.W.6 Mr.Chavan Special Judicial Magistrate. He came to the hospital. After getting certified from Dr.Kashinath Garud (P.W.8) that the patient was conscious and was able to make a statement, he recorded statement (Exhibit-31) of Mangal. Thereafter, Police Head Constable Gangurde (P.W.7) was deputed by the P.S.O. of Wadivarhe Police Station to record the statement of injured Mangal. Accordingly, Police Head Constable Gangurde came to the Hospital and recorded the statement of Mangal (Exhibit-36). The said statement was treated as F.I.R. In both the dying declarations (Exhibits-31 and 36), Mangal has stated that her husband poured kerosene on her and set her on fire.

. On 28.9.1999 on account of 100% burns suffered by Mangal, she succumbed to her injuries. The offence was registered initially as offence under Sections 307 and 498-A of IPC. However, after Mangal expired on 28.9.1999 the case came to be converted into offence under Section 302 and 498-A of IPC. After death of Mangal, her body was sent for post-mortem and it was found that she had sustained 100% burn injuries. After completion of investigation, the

charge-sheet came to be filed. In due course, the case was committed to the Court of Sessions for trial.

3. The learned Additional Sessions Judge framed charge against the appellant and his brother Khandu Mande for the offence under Sections 498-A and 302 of IPC. The charge was read over and explained to the accused to which, accused pleased not guilty and claimed to be tried. Their defence is of denial and false implication. It is the case of the appellant that his wife Mangal sustained accidental burns. The appellant has further taken a plea of *alibi* in his defence. The appellant has examined four defence witnesses. After considering the evidence led by the prosecution, the learned Additional Sessions Judge acquitted both the accused under Section 498-A of IPC. The learned Judge has also acquitted the original accused no.2 Khandu Mande of the offence under Section 302 of IPC. However, as stated above, the learned Judge has convicted the appellant under Section 302 of IPC and sentenced him to life imprisonment. Hence, this appeal.

4. We have heard Mr.Ganesh Gole, the learned

advocate for the appellant and Smt.V.R.Bhosale, the learned A.P.P. for the State. We have perused the judgment and order passed by the learned Additional Sessions Judge as well as the evidence led by the prosecution as well as the accused in support of his case. After carefully considering the entire evidence, we are of the opinion that this appeal deserves to be dismissed.

5. In order to prove its case, the prosecution has examined ten witnesses. P.W.2 Janabai More is the mother of deceased Mangal, P.W.3 Yakima Nathe is the maternal uncle of deceased Mangal. However, both P.W.No.2 Janabai and P.W.3 Jairam have not supported the prosecution case and have turned hostile. P.W.2 Janabai who is the mother of deceased Mangal, has clearly admitted in her cross-examination that they had decided outside the court not to proceed with the case. On account of this, they have not supported the prosecution case. However, there are three dying declarations on record which clearly implicate the appellant. The conviction has been based on these dying declarations.

6. The first dying declaration was made to P.W.3

Dr.Thigale. The incident took place around 7.30 p.m. Thereafter, injured Mangal was taken to Hospital & Dr.Anay Thigale (P.W.3) examined Mangal at 8.15 p.m. At that time, Mangal gave history of homicidal burns on her person by her husband. The said history came to be recorded in the case papers (Exhibit-29). On perusal of Exhibit-29 i.e. case papers, we find that it is clearly noted therein as "history given by the patient herself of homicidal burns by husband".

7. The second dying declaration (Exhibit-31) was the one made to P.W.6 Mr.Chavan Special Judicial Magistrate. Requisition came to be made to P.W.6 Mr.Chavan Special Judicial Magistrate. He came to the hospital. After getting certified from the Dr.Kashinath Garud (P.W.8) that the patient was conscious and was able to make a statement, he recorded statement (Exhibit-31) of Mangal. In the said dying declaration, Mangal has clearly stated that her husband poured kerosene on her and set her on fire. As far as this dying declaration is concerned, Special Judicial Magistrate Mr.Chavan (P.W.6) has stated that before recording the statement, he met the Medical Officer Mr.Garud

(P.W.8) who was on duty. He informed him that he wanted to record statement of injured Mangal and Dr.Garud accompanied P.W.6 Chavan to the burn ward. Dr.Garud examined the patient and verified that patient was conscious and was able to make a statement. Mr.Chavan saw that there was nobody present in the ward and thereafter he started recording the statement of the injured. After completion of recording of statement of Mangal, Dr.Garud again examined Mangal and made endorsement on the said statement Exhibit 31 that the patient was conscious and was able to make a statement.

8. The third dying declaration of Mangal came to be recorded by P.W.7 Police Head Constable Gangurde. This dying declaration (Exh.36) was treated as F.I.R. In the said dying declaration, Mangal has stated that her husband poured kerosene on her and set her on fire. On going through the deposition of the three witnesses who recorded the three dying declarations, we find that nothing has been elicited in the cross-examination of these witnesses so as to disbelieve their testimony. All the three dying declarations are cogent and consistent, hence, we have no hesitation in relying on them.

9. Mr.Gole, the learned advocate for the appellant has submitted that the case is totally dependent on the dying declarations made by the deceased, he submitted that there are major discrepancies in the dying declarations and hence, the said dying declarations cannot be relied upon. Mr.Gole has pointed out two discrepancies. The first discrepancy pointed out by Mr.Gole is that in the dying declaration Exhibit-31 Mangal has stated that after setting her on fire, after she raised shouts, her husband put a blanket on her and extinguished the fire, whereas, in the dying declaration Exhibit-36, she has stated that after her husband set her on fire and she raised shouts, her cousin brother in law Shankar poured water on her and extinguished the fire. The second discrepancy Mr.Gole has pointed out is that in the dying declaration (Exhibit-31) Mangal has stated that accused no.2 Khandu Mande used to abuse her a lot and he used to rush to beat her. However, in the dying declaration (Exhibit-31), Mangal does not state anything about accused no.2 Khandu Mande being present when accused no.1 i.e. present appellant set her on fire. However, in the dying declaration

(Exhibit-36) she has stated that accused no.2 was also present and when the appellant set her on fire, accused no.2 was abusing her. On the basis of these two discrepancies, Mr.Gole has submitted that these two dying declarations cannot be termed as reliable.

10. No doubt, there are some discrepancies regarding the presence of the accused no.2 or regarding the fact as to who extinguished the fire. However, as far as the role of the appellant is concerned i.e. pouring kerosene on Mangal and setting her on fire, there is no discrepancy at all and all the dying declarations are consistent on this aspect, that Mangal sustained burn injuries on account of act of her husband. The two discrepancies pointed out by Mr.Gole are not major discrepancies and they do not affect the prosecution case.

11. Thereafter, Mr.Gole has submitted that the dying declaration recorded by P.W.6 Special Judicial Magistrate Mr.Chavan is a concocted document and it has been created to falsely implicate the appellant. He has submitted that P.W.6 Mr.Chavan has not met Mangal and has not recorded the dying declaration.

In support of this submission, he has placed reliance on the evidence of P.W.6 Mr.Chavan wherein he has stated that it was not possible for him (P.W.6) to say whether Mangal had burn injuries on her face. Mr.Gole has submitted that this shows that P.W.6 had not seen Mangal and had not recorded her dying declaration, because had P.W.6 Mr.Chavan actually recorded the statement of Mangal, he would have been able to state whether the face of Mangal was burnt or not. As far as this aspect is concerned, we find that this witness has thereafter stated that he did not find any ointment applied on the face of the injured. This shows that this witness had seen the face of Mangal. Moreover, it is also to be borne in mind that this witness was deposing after a gap of two years after recording the dying declaration and hence, the memory of this witness would not be very sharp on minor details. As far as all the major aspects are concerned, we find nothing in the evidence of this witness so as to render his testimony unreliable.

12. Thereafter, Mr.Gole has contended that P.W.7 Shivaji Pandharinath Gangurde has also not met Mangal and has not recorded her dying declaration

(Exhibit-36) and the prosecution has created a false document so as to involve the accused. In support of this contention, he has placed reliance on the evidence of P.W.7 Shivaji Gangurde wherein P.W.7 Gangurde has stated that the face of Mangal was not burnt. Mr.Gole has submitted that Mangal had suffered 100% burns, in such case, her face would also have been burnt. The statement made by P.W.7 Gangurde that the face of Mangal was not burnt, according to Mr.Gole, shows that witness had not met Mangal and hence, he has not recorded the statement of Mangal. This witness also has deposed after two years after recording the statement, hence, it would not be possible for him to have a photographic memory and be able to state in detail about facial appearance of the injured person. We have already observed that all the dying declarations are consistent and all of them implicate the accused. In all the dying declarations it has come on record that the accused has set Mangal on fire. As far P.W.3 Dr.Thigale is concerned and P.W.6 Special Judicial Magistrate Mr.Chavan is concerned, they are independent witnesses. Nothing has been brought on record that they had any axe to grind against the accused, so as to implicate him falsely.

13. Thereafter, Mr.Gole submitted that P.W.6 has admitted that in the memo sent to him it was stated that the lady had suffered suicidal burn injuries. As far as this aspect is concerned, it is seen that Exhibit-32 was not made on the basis of any statement given by Mangal. Mangal had been taken to the hospital by her husband and his relatives. The said document clearly shows that the appellant himself had admitted Mangal in the civil hospital at Nasik, therefore, it is clear that it was the appellant who had given the history of suicidal burns. Hence, in our view, no importance can be given to this aspect. The evidence on record clearly shows that at the spot of the incident, a plastic can was found in open condition and the plastic can was empty. This clearly supports the prosecution case that the accused poured kerosene on Mangal and thereafter set on fire and it was not a case of Mangal being set her on fire accidentally. The piece of saree of Mangal, which was found on the spot as well as her petticoat was sent to the Chemical Analyser. The Chemical Analyser report Exhibit-18 shows that kerosene residues were found on the saree as well as on the petticoat. Had it

been a case of accidental burns, there would have been no question of finding any kerosene on the saree as well as on the petticoat of Mangal. The finding of the kerosene on the saree and petticoat clearly corroborates the prosecution case that kerosene was poured on Mangal and thereafter, Mangal was set on fire.

14. The accused has examined four witnesses in their defence i.e. D.W.1 Sindhu Shankar Mande, D.W.2 Keru Kalu Dhongde, D.W.3 Baburao Waman Gulve and D.W. Vithal Shankar Gulve. All these witnesses in their evidence have stated that Mangal was shouting that she was burnt. They rushed to her house. D.W.1 Sindhu says that her husband used a blanket and put out the fire. They have further stated that at the time of incident, except Mangal, no one was present in the house. They asked Mangal as to how the incident occurred and Mangal told them that while cooking food the stove flared up and hence, she caught fire. As far as the story put forward by the defence witnesses is concerned that Mangal caught fire accidentally while she was cooking, we have already observed above that spot panchnama and the C.A. report regarding clothes of

Mangal clearly make out a case that kerosene had been poured on her person. Looking to these circumstances and the dying declarations of Mangal, we are of the opinion that the entire story put forward by the defence witnesses is rendered unbelievable. Hence, we are not inclined to rely on the same. For the same reason we are not inclined to rely on the defence of alibi taken by the accused. In any event, the accused has not brought any cogent evidence on record to show that he was at any such place at the time of the incident so as to render his presence at his residence at the time of the incident as improbable.

15. After going through the evidence on record, we find that the prosecution has amply proved its case that it was the appellant who had set Mangal on fire and caused her death due to burn injuries. As stated earlier, P.W.2 Janabai More the mother of Mangal and her maternal uncle P.W.3 Baburao Gulave have not supported the prosecution case on account of the decision taken by them that they have settled out of Court and they should not proceed with the case. Hence, no reliable material has been brought on record by the prosecution to prove the charge

under Section 498-A of IPC. In this view of the matter, in our view, the learned Judge has rightly acquitted both the accused under Section 498-A of IPC so also as far as accused no.2 Khandu Mande is concerned, no role is attributed by Mangal to him in setting her on fire. Hence, he has been rightly acquitted under Section 302 of IPC. However, as far as the present appellant is concerned, there is sufficient material on record brought forth by the prosecution so as to prove his complicity in this offence. Hence, in our view, the learned Judge has rightly convicted the present appellant under Section 302 of IPC.

16. At this stage, Mr.Gole has submitted that the evidence on record shows that the appellant had extinguished the fire on Mangal and hence, the case would not fall under Section 302 of IPC but it would fall under Section 304-II of IPC. In support of this contention, Mr.Gole has placed reliance on the decision of the Supreme Court in the case of **Kalu Ram Vs. State of Rajasthan reported in S.C.C. (2000) 10 S.C.C. 324**. In the said case, the accused set his wife on fire, thereafter, he had extinguished the fire. The Supreme Court observed

in the facts and circumstances of that case, that the accused would not have intended to inflict the injuries which his wife had sustained and hence, the conviction was altered from offence under Section 302 of IPC to Section 304-II of IPC. In the present case, there is no cogent or consistent evidence to show that it was the appellant who had extinguished the fire. Moreover, it has come on record that Mangal suffered 100% burn injuries. The evidence on record has clearly brought out that it was the appellant who set Mangal on fire. Thereafter, if at all the appellant had extinguished the fire, it was only after Mangal sustained 100% burn injuries. In such case, it cannot be said that the accused did not intend to inflict the injuries which were sustained by his wife on account of his act. Thus, in our view, the said decision would be of no avail to the appellant. The evidence on record in the present case shows that the case clearly falls under 302 of IPC.

17. In the result, the conviction and sentence as imposed on the appellant by the learned Sessions Judge is confirmed. The appellant is in jail. He shall serve out his sentence. Appeal is dismissed.

[SMT.V.K.TAHILRAMANI, J.] [S.B.MHASE, J.]